

The legacy of the Nuremberg trials – 60 years on

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1 Introduction

World War II cost the lives of approximately 55 million people, mostly civilian non-combatants, and saw the commission of widespread human rights atrocities on all sides. The mass murder conducted by Nazi Germany in its concentration and extermination camps and other human rights atrocities which were committed by its armed forces and security personnel mainly in Eastern Europe led to the establishment of the international military tribunal of Nuremberg in 1946.

Consequently, the four main victors of World War II, the United States of America, Great Britain, the Soviet Union and France, decided to bring the perpetrators of the defeated enemy to justice before their “own” international – albeit allied – tribunal,¹ with the prosecution following the explicit objective that “justice and not revenge” should be the main motive behind it. Consequently, the United States’ view that the defendants were to be granted a fair trial dominated.² Or, as their chief prosecutor, Jackson, stated in his well-known opening address, “the four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law”.³

The international military tribunal⁴ at Nuremberg was established⁵

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¹ See United Nations War Crimes Commission *Law – Report of Trials of War Criminals* (1949) IX referring to the fact that the Leipzig court cases had shown that the prosecution of war criminals before their own domestic courts did not achieve the desired effects in respect of establishing the factual context of the committed crimes and deterrence.

² See art 1 and 16 of the Nuremberg Charter. It was mostly the USA that urged the other three powers to follow this principle, and the understanding of justice somehow differed among the powers: eg, the British favoured the idea of executing all German leaders without a formal trial. See Hogan-Doran “Aggression as a crime under international law and the prosecution of individuals by the proposed international criminal court” 1996 *Netherlands International Law Review* 330 *et seq.* Stalin favoured this procedure as well but suggested a *pro forma* trial in the tradition of the Soviet purgation trials of the thirties. See Steyn “Guantanamo Bay: the legal black hole” 2004 *International and Comparative Law Quarterly* 9 n 33.

³ See Heydecker and Leeb *Der Nürnberger Prozeß* (1958) 534.

⁴ Judges and prosecution consisted of allied personnel alone. The fact that no member of a “neutral” state was allowed to participate in the trials already questions the nature of the international military tribunal as being “international”.

⁵ The Tokyo tribunal was established in 1946 and had jurisdiction over crimes committed by the Japanese in the Far East. Its jurisdiction, procedure and powers followed the Nuremberg Charter. It sentenced 25 Japanese war criminals out of the original 28 accused. See Ratner and Abrams *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy* (2001) 189.

following the joint declaration⁶ of the four victors in their “London Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis”.⁷ The tribunal’s main purpose was the “just and prompt” trial and punishment of the major war criminals of Germany.⁸ The establishment of the two post-World War II criminal *ad hoc* tribunals for the prosecution of the main war criminals of the Axis powers in Nuremberg and Tokyo established without a doubt a new accountability mechanism for human rights atrocities under international law. But 60 years on there still remain questions about the legality and eventual legacy of these tribunals.

This article focuses on the international military tribunal at Nuremberg⁹, describing its law, the main criticism of its legality and partiality and its impact on the shaping of international law. It also explores the issue of whether there could have been judicial alternatives to the establishment of the tribunal.

2 The law

2.1 Jurisdiction and sentencing

The tribunal had jurisdiction “*ratione materiae*” under article 6 (a) to (c) of the Charter of the International Military Tribunal¹⁰ over the following three offences: crimes against peace, war crimes and crimes against humanity. Article 6 clarifies that this law constituted “new” retroactive law which was to be unaffected by existing domestic provisions.¹¹ The Nuremberg Charter excluded the admissibility of the defences of superior orders, command of law and act-of-state immunity,¹² thereby extending the court’s jurisdiction “*ratione personae*” to former heads of state such as the last *Reichskanzler* of the Third Reich, Admiral Dönitz.¹³ The charter established not only individual criminal responsibility¹⁴ but group responsibility as well.¹⁵

⁶ The Allied Powers had already declared in their Moscow declaration of 30 October 1943 “Concerning responsibility of Hitlerites for committed atrocities” their intent to try all German war criminals.

⁷ “The (London) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal” 82 *United Nations Treaty System* 280, entered into force 8 Aug 1945.

⁸ *ibid*, art 1.

⁹ The terms “court” and “tribunal” are used interchangeably.

¹⁰ The latter is referred to as Nuremberg Charter as well.

¹¹ *ibid*, art 6: “whether or not in violation of the domestic law of the country where perpetrated.” See Renz “Völkermord als Strafsache. Vor 35 Jahren sprach das Frankfurter Schwurgericht das Urteil im großen Auschwitz-Prozess”, essay, retrievable at http://www.fritz-bauer-institut.de/texte/essay/08-00_renz.htm, 6 *et seq.* This provision is also of relevance for the “mistake of law” defence, see below under § 2.2.3.

¹² *ibid* art 7 and 8.

¹³ who succeeded the “Führer” Adolf Hitler as German head-of-state after the latter’s suicide in April 1945.

¹⁴ art 6 of the Nuremberg Charter.

¹⁵ *ibid* art 9 and 10. Art 9 reads: “At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.” See Jørgensen *The Responsibility of States for International Crimes* (2003) 61-62 for a detailed account.